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No. 94-1683

In The

Supreme Court of the United States

October Term, 1994

DELTA AIRLINES, INC.,

Petitioner,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did a bankruptcy court have subject matter jurisdiction of an adversary proceeding against a non-party to any prior proceedings in bankruptcy court, when the adversary proceeding was filed five years after the underlying bankruptcy was dismissed?

2. After dismissal of the debtor's bankruptcy case, did a bankruptcy court have authority to enter a permanent injunction in favor of a non-debtor against further proceedings in state court by a non-party to any prior proceedings in the bankruptcy court?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judgment is sought to be reviewed, and their parent companies and non-wholly-owned subsidiaries, were:

Petitioner, Delta Airlines, Inc.;

Respondent, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union");

American International Group (AIG), parent company of National Union;

Howard K. Schwamb, Jr. and Mary Schwamb ("the debtors"), former debtors in bankruptcy court and plaintiffs in a personal injury action in Louisiana state court;

Paul Dué, Rick Caballero, and the law firm of Dué, Smith & Caballero, former counsel for the debtors in Louisiana state court; and

Eric A. Holden, Patricia A. Garcia, and the law firm of Holden & Garcia, former counsel for the debtors in bankruptcy court.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

Petitioner, Delta Airlines, Inc., included in its appendix the unofficial reports of opinions delivered in this case by other courts or administrative agencies.

JURISDICTION

Petitioner, Delta Airlines, Inc., invokes the jurisdiction of this Court pursuant to Title 28 U.S.C. § 1254(1) to review by writ of certiorari the February 10, 1995 and March 9, 1995 per curiam decisions of the U.S. Fifth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case are set out verbatim below.

Title 28 U.S.C. § 151 provides that:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

Title 28 U.S.C. § 157(a) provides that:

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

Title 28 U.S.C. § 1334(a) and (b) provides that:
(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district court, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Title 28 U.S.C. § 1367(a) provides that:
Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Title 28 U.S.C. § 2283 provides that:
A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.

Title 11 U.S.C. § 105(a) provides that:
The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Rule 1.05 of the Uniform Local Rules of the United States District Court for the Eastern District of Louisiana ("ULLR") provides that:

> *Whenever a civil matter, commenced in or removed to the court, involves subject matter that either comprises all or a material part of the subject matter or operative facts of another action, whether civil or criminal, then pending before this or another court or an administrative agency, or previously dismissed or decided by this court, counsel shall append on a separate sheet of paper, to the front of the complaint, a list and description of all such actions then known to counsel and a brief summary of the relationship. If information concerning any such action or proceeding is obtained subsequent to the filing of the original pleading in the latter case, it shall be the duty of counsel obtaining such information to notify the court and opposing counsel in writing of the information so received in the same manner.*

The Order of Reference of Bankruptcy Cases and Proceedings of the United States District Court for the Eastern District of Louisiana ("Order of Reference") provides that:

> *It is ORDERED that the Order of Reference of Bankruptcy Cases and Proceedings entered on August 2, 1984 is hereby withdrawn, vacated and set aside and the following order is entered in its place.*
>
> *Pursuant to 28 U.S.C. Section 157, it is hereby ORDERED that any or all cases under Title 11 or any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 filed in or transferred or removed to this district be and they hereby are referred to the Bankruptcy Judges of this district for consideration and resolution consistent with law.*
>
> *It is further ORDERED that the Bankruptcy Judges for the Eastern District of Louisiana be, and they*

hereby are, directed to exercise the authority and responsibilities conferred upon them as Bankruptcy Judges by 28 U.S.C. Section 151 et seq. and this court's order of reference, as to all cases and proceedings covered by this order.

In accordance with 28 U.S.C. Section 157(b)(5), it is further ORDERED that all personal injury tort and wrongful death claims shall be tried in, or as determined by, this court and shall not be referred by this order.

So ORDERED this 30th day of March, 1990.

STATEMENT OF THE CASE

Respondent, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union"), submits this statement of the case to address perceived misstatements of fact in the statement of the case submitted by petitioner, Delta Airlines, Inc. ("Delta").

On January 14, 1984, Howard K. Schwamb, Jr. and Mary Schwamb (together, "the Schwambs" or "the debtors") filed a personal injury suit against Delta in Louisiana state court (App. 5). On October 21, 1985, National Union intervened in that suit to recover workers' compensation payments to the Schwambs, but the state court severed National Union's claims from trial of the principal claims (App. 5). The Schwambs ultimately won a judgment of over $1 million against Delta in state court (App. 5), but in March 1988 their counsel returned the checks tendered by Delta to satisfy the judgment, suggesting to Delta that "in light of the worker's compensation issue, you instead immediately have all of this money" deposited in the state court registry (App. 5-6).

On April 4, 1988, acting through new counsel, the Schwambs moved in bankruptcy court to compel Delta to deposit the funds instead in the registry of the bankruptcy court (App. 6), where the Schwambs had filed a petition under Chapter 7 of the Bankruptcy Code (App. 23). The bankruptcy court granted the Schwambs' motion on April 5, 1988 and Delta deposited the funds in the registry of the bankruptcy court (App. 6, 24). The Schwambs' creditors were paid and the Schwambs' bankruptcy was dismissed (App. 6). Delta did not notify the bankruptcy court of National Union's intervention in state court and did not notify National Union of the motion to compel satisfaction of the state court judgment in the bankruptcy court (App. 7).

On February 2, 1989, the Schwambs filed a satisfaction of judgment in Louisiana state court (App. 6). On October 16, 1989, National Union filed an amended petition of intervention in state court claiming that Delta had also become liable to National Union for the workers' compensation payments to the Schwambs (App. 6). Delta's motion for summary judgment in state court was denied (App. 6). On August 28, 1990, Delta filed a third-party complaint in a still-pending adversary action in bankruptcy court (App. 6-7), but the complaint was dismissed as improper on January 15, 1993 (App. 7, 23-27).

Delta then commenced a new adversary proceeding seeking to prevent National Union from seeking relief against Delta in state court, and National Union sought damages for Delta's failure to notify the bankruptcy court or National Union of the full scope of proceedings involving the funds used to satisfy the state court judgment (App. 7). On October 29, 1993, the bankruptcy court granted Delta's motion for summary judgment and

denied National Union's cross-motion for summary judgment, issuing a permanent injunction barring all parties from pursuing any claims against Delta related to Delta's April 1988 deposit of funds into the registry of the bankruptcy court (App. 7).

National Union appealed the bankruptcy court's issuance of the injunction to the district court, which reversed for lack of subject matter jurisdiction under 28 U.S.C. § 1334 and lack of authority under 11 U.S.C. § 105 (App. 3-12). Delta appealed to the U.S. Fifth Circuit Court of Appeals, which affirmed the district court's ruling based on lack of subject matter jurisdiction (App. 1-2) and denied Delta's petition for rehearing *en banc* (App. 3-4).

Delta then filed a petition for writ of certiorari in this Court.

BASIS FOR FEDERAL JURISDICTION

Jurisdiction pursuant to 28 U.S.C. § 1334 was lacking in the court of first instance, the United States Bankruptcy Court for the Eastern District of Louisiana.

ARGUMENTS FOR DENYING THE PETITION

Summary of Argument

Delta's petition for writ of certiorari should be denied first because the bankruptcy court lacked subject matter jurisdiction under 28 U.S.C. §§ 151, 157, 1334, and 1367 and the Order of Reference by the U.S. District Court for the Eastern District of Louisiana. The petition should also be denied because the bankruptcy court lacked authority to issue the disputed injunction under 11 U.S.C. § 105 and 28 U.S.C. § 2283. Finally, Delta's petition should also be denied because Delta was not deprived of

property without due process of law in violation of the Fifth Amendment to the U.S. Constitution.

(i) The Fifth Circuit and the district court properly found no subject matter jurisdiction under 28 U.S.C. § 1334.

The Fifth Circuit has held that the test for determining bankruptcy jurisdiction under 28 U.S.C. § 1334 is "whether the outcome of [the] proceeding could *conceivably* have any effect on the estate being administered in bankruptcy." *Matter of Wood*, 825 F.2d 90, 93 (5th Cir. 1987), quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis supplied in *Wood*); *see also In re Spaulding & Co.*, 131 B.R. 84, 88 (N.D.Ill. 1990). As pointed out by the district court, the bankruptcy court could not have jurisdiction of Delta's request for injunctive relief in the instant case, because the debtors' bankruptcy was dismissed, and there is no estate in bankruptcy (App. 6, 8-10).

National Union was never a party to any aspect of the bankruptcy proceedings, and "jurisdiction over non-bankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent bankruptcy does not exist." *In re Haug*, 19 B.R. 223, 224-225 (Bankr. D.Ore. 1982), quoted in *Pacor, supra*, 743 F.2d at 994 (3d Cir. 1984).

The situation in this case is exactly the situation proscribed in *In re Haug, supra*. National Union, left out of the bankruptcy proceedings, should not fall prey years later to a new adversary proceeding filed in a dismissed bankruptcy. Subject matter jurisdiction simply does not exist in that context, because the requisite effect on the bankruptcy proceedings is impossible if the bankruptcy

was dismissed, and because jurisdiction cannot arise from some conceivable effect that the bankruptcy proceedings might have had on National Union's claims against Delta or the debtors. *Matter of Majestic Energy Corp.*, 835 F.2d 87, 90-91 (5th Cir. 1988); *In re Alpha Steel Co., Inc.*, 142 B.R. 465, 469-470 (M.D.Ala. 1992); *cf. In re Marine Iron & Shipbuilding Co.*, 104 B.R. 976, 986 (D.Minn. 1989) (neither cross-relationship of claims nor statutory source of federal jurisdiction over debtor's claim supported assertion of pendent-party jurisdiction).

In its petition to this Court, Delta raises new arguments about a bankruptcy court's jurisdiction of an adversary proceeding notwithstanding dismissal of the underlying bankruptcy case. However, not one case cited by Delta involves the exercise of jurisdiction under § 1334 in a new adversary proceeding filed after dismissal of the principal bankruptcy case and involving a defendant who was not party to any prior bankruptcy proceedings.

For example, Delta cites a number of decisions involving the bankruptcy courts' ancillary jurisdiction over still-pending adversary proceedings[1] or still-pending matters removed from state court as bankruptcy-

[1] *In re Morris*, 950 F.2d 1531 (9th Cir. 1992) (adversary proceeding left unresolved after Chapter 11 case was dismissed); *In re Universal Farming Industries*, 873 F.2d 1334 (9th Cir. 1989) (controversy between two creditors not moot after dismissal of underlying bankruptcy case); *In re Smith*, 866 F.2d 576 (3d Cir. 1989) (adversary proceeding left unresolved after Chapter 13 case was converted into Chapter 7 liquidation); *In re Roma Group, Inc.*, 137 B.R. 148 (Bankr. S.D.N.Y. 1992) (jurisdiction retained over part of adversary proceeding after involuntary dismissal of two Chapter 11 cases); *In re Stardust Inn, Inc.*, 70 B.R. 888 (Bankr. E.D.Pa. 1987) (adversary proceeding left unresolved after voluntary dismissal of Chapter 11 cases); *In re Pocklington*, 21 B.R. 199 (Bankr. S.D.Ca. 1982)

related,[2] even after voluntary or involuntary dismissal of the underlying bankruptcy cases. Delta also cites other decisions involving a bankruptcy court's authority to enter judgments after dismissal of a bankruptcy on matters tried or decided pre-dismissal,[3] the similar authority to enforce a settlement agreement which had ended an adversary proceeding,[4] or the authority to hear a declaratory judgment action to interpret its own prior lift stay order.[5]

(adversary proceeding filed before voluntary dismissal of Chapter 13 case); *In re Lake Tahoe Land Co., Inc.*, 12 B.R. 479 (Bankr. D.Nev. 1981) (adversary proceeding filed before involuntary dismissal of Chapter 11 case).

[2] *In re Carraher*, 971 F.2d 327 (9th Cir. 1992) (still-pending fraud claims removed from state court as related to a then-pending bankruptcy case which was later dismissed).

[3] *In re Porges*, 157 B.R. 212 (Bankr. E.D.N.Y. 1993) (judgment properly entered even after debtor's voluntary dismissal of Chapter 13 case, when bankruptcy court had already decided on the debtor's objection to a creditor's claims after full day trial); *In re Lawson*, 156 B.R. 43 (Bankr. 9th Cir. 1993) (judgment entered after dismissal of Chapter 11 case on final fee awards decided before dismissal of Chapter 11 case).

[4] *In re Fleet Service Corp., Inc.*, 144 B.R. 909 (Bankr. M.D.Fla. 1992) (ancillary jurisdiction existed to rule on debtor's motion to enforce settlement in adversary proceeding, even after dismissal of underlying Chapter 11 case).

[5] *In re Franklin*, 802 F.2d 324 (9th Cir. 1986). Delta also cites two other decisions with no relation to this case, *In re Moseley*, 161 B.R. 382 (Bankr. E.D.Tex. 1993) (adversary proceedings still in early stages were dismissed along with bankruptcy because no prejudice would result to parties in adversary proceeding); *Un-Common Carrier Corp. v. Oglesby*, 98 B.R. 751 (S.D.Miss. 1989) (same, plus no other jurisdictional grounds to retain patent licensing dispute initially brought as adversary proceeding in bankruptcy court and then transferred to district court).

None of those cases bear any similarity to this case, in which Delta brought a new adversary proceeding against National Union in 1993, five years after dismissal of the underlying bankruptcy case.[6] This case more resembles the situation at issue in another decision cited by Delta, in which the Ninth Circuit first acknowledged a bankruptcy court's continuing jurisdiction "to *interpret* orders entered prior to dismissal of the underlying bankruptcy case"[7] and "to dispose of ancillary matters such as an application for an award of attorney's fees for services rendered in connection with the underlying action,"[8] but then emphasized that "[t]he bankruptcy court does not have jurisdiction . . . to grant new relief independent of its prior ruling once the underlying action has been dismissed."[9]

Delta tries to tie its adversary proceeding, filed in 1993, to an apparently still-pending adversary proceeding filed in 1988, claiming that the bankruptcy court's continuing jurisdiction and authority over the 1988 proceeding "cloaked Adversary Proceeding 93-1027-THK, the

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[6] Delta first named National Union as a third-party defendant in Adversary Proceeding No. 88-0099, which was commenced before dismissal of the underlying bankruptcy. The bankruptcy court dismissed the third-party complaint as improper, because Delta did not allege that National Union was liable for any part of the debtors' claim against Delta in the adversary proceeding. (*See* App. 21-29.)

[7] *In re Taylor*, 884 F.2d 478, 481 (9th Cir. 1989) (emphasis in *Taylor*), citing *Beneficial Trust Deeds v. Franklin (In re Franklin)*, 802 F.2d 324, 326-327 (9th Cir. 1986).

[8] *Id.*, citing *USA Motel Corp. v. Danning*, 521 F.2d 117 (9th Cir. 1975).

[9] *Id.*, citing *Armel Laminates, Inc. v. Lomas & Nettleton Co. (In re Income Property Builders, Inc.)*, 699 F.2d 963, 964 (9th Cir. 1982).

Complaint for Declaratory Judgment filed by Delta at the invitation of the bankruptcy court to replace Delta's third party complaint in Adversary Proceeding 88-0099K." (Delta's Petition at p. 13.) That assertion runs directly afoul of the above-quoted rules that "[t]he bankruptcy court does not have jurisdiction . . . to grant new relief independent of its prior ruling once the underlying action has been dismissed"[10] and that "jurisdiction over non-bankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent bankruptcy does not exist."[11]

Finally, Delta argues that the bankruptcy court has authority to render declaratory relief under 28 U.S.C. § 2201. Bankruptcy courts may indeed possess the authority to grant declaratory relief, but only if they have subject matter jurisdiction:

> If proceedings involve declaratory relief, they are subject to the general jurisdictional and referral provisions of 28 U.S.C. § 1334 and 28 U.S.C. § 157, respectively. Section 2201 is not a grant of jurisdiction to the federal courts, but only makes available an additional remedy in cases over which those courts already have jurisdiction.

1 *Collier on Bankruptcy* § 3.01[10] at pp. 3-126 to 3-127 (15th ed. 1993).

In sum, both the Fifth Circuit and the district court acted properly when they applied 28 U.S.C. § 1334 to the facts of this case and ruled that the bankruptcy court

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[10] *In re Taylor*, 884 F.2d 478, 481 (9th Cir. 1989).

[11] *In re Haug*, 19 B.R. 223, 224-225 (Bankr. D.Ore. 1982), quoted in *Pacor, supra*, 743 F.2d at 994 (3d Cir. 1984).

lacked jurisdiction to hale National Union into bankruptcy court five years after dismissal of the underlying bankruptcy.

(ii) The bankruptcy court lacked ancillary or supplemental jurisdiction.

As two additional, intertwined arguments, Delta asserts that the bankruptcy court had "ancillary" jurisdiction of its request for injunctive relief or, alternatively, supplemental jurisdiction pursuant to 28 U.S.C. § 1367. These arguments are also flawed, because Delta did not seek to adjudicate a "supplemental and ancillary bill in equity" (*see* Petition at p. 21) and because bankruptcy courts do not have jurisdiction under § 1367.

First, in its "ancillary jurisdiction" argument, Delta relies upon a series of decisions distinguishable on their face from this case. For example, in *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934), this Court held that an assignment of future wages was covered by the debtor's discharge in bankruptcy, when the debtor "includ[ed] in his schedule of liabilities" the loan that was to have been repaid with the wages. *Id.*, 292 U.S. at 238, 54 S.Ct. at 696. Unlike in *Hunt*, no discharge is involved in this case. Also unlike in *Hunt*, Delta could have avoided the dilemma it later sought to avoid, as indicated by the bankruptcy court's comment that "[t]he Court feels that an injustice has been done and that if notice had been sent to all interested parties, we would not be here today."[12]

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[12] *See* August 17, 1993 Minute Entry, U.S. Bankruptcy Court for Eastern District of Louisiana at p. 2 (App. 20).

In the instant case, neither the debtors nor Delta ever informed the bankruptcy court of National Union's claim to the money paid by Delta and distributed by the bankruptcy court, and neither Delta nor the debtors informed National Union of the proceedings in bankruptcy court (App. 7). That lack of notice to either National Union or the bankruptcy court also distinguishes this case from the other decisions cited by Delta for general propositions such as a court's ability to enforce its own prior orders,[13] or the equitable power of the bankruptcy courts.[14]

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[13] *E.g., Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297-1298 (5th Cir. 1992) (injunction of investors' state court suit against insurer was properly based on prior declaratory judgment of no insurance coverage to corporation, when investors brought claims as assignees of sole stockholder in corporation); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870 (5th Cir. 1984) (judgment ordering and confirming sale of property precluded claims of fraud related to sale of property, when claims were made by party to sale and party who was active in reorganization proceeding or was at least a privy of party to reorganization); *In re Unioil*, 948 F.2d 678, 682 (10th Cir. 1991) (enjoining vice president of debtor corporation from further post-petition transfers and payments); *Matter of Barnes*, 969 F.2d 526, 528 (7th Cir. 1992) (enjoining state court suit to collect unlisted debt, because creditor had notice of bankruptcy proceeding); *but see Kokkonen v. Guardian Life Ins. Co. of Am.*, 62 U.S.L.W. 4313, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (ancillary jurisdiction did not allow court to enforce prior settlement agreement because (a) same facts were not involved and (b) dismissal order did not require performance of settlement agreement or purport to retain jurisdiction over settlement).

[14] *E.g., Pepper v. Litton*, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281 (1939) (equitable subordination of claim); *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 60-61 (2d Cir. 1992) (equitable basis for substantive consolidation of estates of partnership and general partners); *In re Octagon Roofing*, 157 B.R. 852, 856-857 (N.D.Ill. 1993) (equitable subordination of claim); *M. Prusman, Ltd. v.*

Other cases cited by Delta are also completely inapplicable to the facts of this case. For instance, *Dugas v. American Surety Co. of New York*, 300 U.S. 414, 57 S.Ct. 515, 81 L.Ed. 720 (1937) involved a suit against the surety on an appeal bond, by a party who did not recover his entire judgment because of another judgment rendered in a federal interpleader action. No interpleader was involved here. National Union also was not a party to any bankruptcy proceeding – certainly not one in which the court explicitly retained jurisdiction to ensure enforcement of its orders, as in *State of Michigan v. City of Allen Park*, 739 F.Supp. 1102, 1106 (E.D.Mich. 1990), *aff'd*, 954 F.2d 1201 (6th Cir. 1992).[15]

Second, Delta's argument of supplemental jurisdiction under 28 U.S.C. § 1367 is undercut by the decisions cited by Delta. In one decision, the court plainly held that § 1367 cannot serve as the basis for bankruptcy court jurisdiction because § 1367 confers jurisdiction only to district courts. The court noted that although 28 U.S.C. § 151 makes the bankruptcy courts units of the district courts, § 151 also limits the bankruptcy judge's authority

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Ariel Maritime Group, Inc., 781 F.Supp. 248, 252 (S.D.N.Y. 1991) (enforcement of prior judgments by collateral estoppel and piercing of corporate veil).

[15] Delta also was not ignorant of conflicting claims to the money it paid into the registry of the bankruptcy court. Nonetheless, Delta did not inform the court of National Union's competing claim to that money, and thus cannot claim the type of protection accorded to an innocent purchaser in another case cited by Delta. *Julian v. Central Trust Co.*, 193 U.S. 93, 24 S.Ct. 399, 48 L.Ed. 629 (1904) (allowing injunction of state court proceeding against property, when judgment in state court was rendered against prior owner, in suit in which purchaser of property through judicial sale in federal court was not a party).

to "Title 28, chapter 6, specifically § 157." *In re Fisher*, 151 B.R. 895, 899 (Bankr. N.D.Ill. 1993).

Section 157(a) provides that a district court "may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." The U.S. District Court for the Eastern District of Louisiana entered an order pursuant to § 157(a), providing that "any or all cases under Title 11 or any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 filed in or transferred or removed to this district" be referred to the bankruptcy Judges of the district.[16] The same phraseology was used in the order of reference that applied in *In re Fisher, supra.*

The court in *In re Fisher* noted that the only "other law" referred to in § 151 that might be applicable was § 1367, which applied only to district courts. *In re Fisher*, 151 B.R. 895, 899 (Bankr. N.D.Ill. 1993). The order of reference in that case, as in this case, had not provided for the referral of jurisdiction under § 1367, and even if it had, "[a]ny additional referral of jurisdiction beyond that allowed by 28 U.S.C. § 157(a) would be subject to significant constitutional concerns." *Id.*, 151 B.R. at 899 n.4 (Bankr. N.D.Ill. 1993).

The other cases cited by Delta involve the exercise of removal jurisdiction over claims between parties already joined in a bankruptcy-related case,[17] or the exercise of

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[16] *See* March 30, 1990 Order of Reference of Bankruptcy Cases and Proceedings of the United States District Court for the Eastern District of Louisiana.

[17] In one decision, a state court legal malpractice case was removed to a bankruptcy court which had earlier approved an

pendent-party jurisdiction over third-party defendants.[18] As discussed above, Delta's effort to block National Union's claim in state court was not sufficiently related to the bankruptcy case to fall within § 1334's broad jurisdictional grant as to cases "arising in or related to cases under title 11" because "jurisdiction over nonbankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent bankruptcy does not exist." *In re Haug*, 19 B.R. 223, 224-225 (Bankr. D.Ore. 1982).

Because Delta's claims were not even "related to" a case under Title 11, it makes no sense for Delta to claim that its attempt to block National Union's claims were "so related" to claims in the prior adversary proceeding as to form part of the "same case or controversy" under § 1367.

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award of fees to the malpractice defendant. The bankruptcy court held that it had supplemental jurisdiction of the malpractice case because the quality, reasonableness and necessity of the attorney's work were essential facts of both matters so as to make the malpractice case part of same case or controversy with the attorneys' fee litigation in the still-ongoing bankruptcy case. *In re W.J. Services, Inc.*, 139 B.R. 824 (Bankr. S.D.Tex. 1992). That analysis seems unnecessary in light of the more straightforward basis for removal jurisdiction under 28 U.S.C. §§ 1334 and 1452. *See, e.g., In re Griffith*, 6 B.R. 753 (Bankr. D.N.M. 1980) (entire case and not just claim by debtors could be removed pursuant to former bankruptcy-related removal statute, 28 U.S.C. § 1478).

[18] *In re Joint Eastern & Southern District Asbestos Litigation*, 769 F.Supp. 85, 86-87 (E. & S.D.N.Y. 1991) (Weinstein, J.) (pendent-party jurisdiction exercised pursuant to 28 U.S.C. § 1367 over third-party defendants). In contrast, the bankruptcy court in this case dismissed Delta's third-party complaint against National Union in the pre-existing adversary proceeding, because Delta could state no claim under Bankruptcy Rule 7014, the bankruptcy counterpart to Federal Rule of Civil Procedure 14. (*See* App. 23-29).

It also makes no sense for Delta to try to invoke the supplemental jurisdiction of the bankruptcy court over the last two years, to the point of petitioning this Court for certiorari, all to block a half-day trial on a $100,000 workers' compensation claim in Louisiana state court. Delta's position, lacking in practical sense, lacks legal justification just as plainly: if Delta's claims were not sufficiently "related to" a bankruptcy case to permit jurisdiction under 28 U.S.C. § 1334(a) or (b), then Delta's claims certainly were not so interwoven with the bankruptcy to permit jurisdiction under 28 U.S.C. § 1367. Delta's petition should therefore be denied as to any claims of supplemental jurisdiction.

(iii) The bankruptcy court lacked authority to issue the disputed injunction pursuant to 11 U.S.C. § 105.

Delta claims that the bankruptcy court had authority to issue the disputed injunction pursuant to 11 U.S.C. § 105. Section 105(a) authorizes the bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." It does not authorize boundless intervention by the bankruptcy courts:

> [I]t should be universally recognized that the power granted to the bankruptcy courts under section 105 is not limitless and should not be employed as a panacea for all ills confronted in the bankruptcy case. Section 105 does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code or mandates of other state and federal statutes.

2 *Collier on Bankruptcy* ¶ 105.01[3] at p. 105-4 (15th ed. 1993).

The courts have generally found that only limited authority exists to enjoin third parties under § 105, such that "the court must find that failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through that third party." *In re Otero Mills, Inc.*, 21 B.R. 777, 778 (Bankr. D.N.M. 1982), *aff'd*, 25 B.R. 1018 (D.N.M. 1982).

Delta's potential liability to National Union simply could not threaten the bankruptcy estate of the former debtors as required under *Otero*. For one thing, Delta sought a permanent injunction long after the bankruptcy estate ceased to exist and the debtors' bankruptcy case was dismissed. Even if a bankruptcy estate were at issue, National Union could not "detrimentally influence" or "pressure" the debtors through Delta. The debtors already owed National Union reimbursement for workers' compensation payments, and National Union seeks to hold Delta liable for acting in a way that defeated or at least impaired National Union's ability to collect from the debtors. Delta simply is not a party whose fortunes would have directly affected the debtor.

Like the court in *Otero*, the Fifth Circuit has limited the availability of injunctive relief under § 105, by requiring the relief to be tailored to the Bankruptcy Code's demands:

> [T]he powers granted by [§ 105] may be exercised only in a manner consistent with the provisions of the Bankruptcy Code. [The] statute does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.

United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986).[19]

In this case, the bankruptcy court improperly relied on § 105 for exactly the purposes proscribed by the Fifth Circuit – for authority "to create substantive rights" and for a "roving commission to do equity."

Delta also lacked standing to seek an injunction under § 105. "Standing to bring the adversary proceeding to enjoin the actions of a third party rests with the debtor, debtor in possession, or the trustee, and not with the third party." 2 *Collier on Bankruptcy* ¶ 105.02[2] at p. 105-10 (15th ed. 1993), citing *In the Matter of Venegas Munoz*, 73 B.R. 283, 285 (Bankr. D.P.R. 1987).

Delta ignores these obstacles to the propriety of the instant injunction, arguing only that § 105 "authorizes bankruptcy courts to issue injunctions and take other necessary steps in aid of their jurisdiction." (Delta's Petition at p. 24, *quoting U.S. v. Sutton, supra.*) Delta's only other argument, that it is "threatened with civil double jeopardy," is absurd, because Delta is furiously trying to avoid returning to the same state court that issued the "final judgment" upon which Delta relies, and which Delta improperly satisfied in bankruptcy court – without informing National Union of its actions and without

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[19] *See also A.H. Robbins Co. v. Piccinin*, 788 F.2d 994, 999-1002 (4th Cir. 1986), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986), *cert. denied sub nom. Committee of Representatives of Dalkon Shield Claimants v. A.H. Robins, Inc.*, 479 U.S. 876, 107 S.Ct. 251, 98 L.Ed.2d 177 (1986) (§ 105(a) stays asked by debtors to restrain extra-bankruptcy actions require unity of interest between debtor and threatened third party, indemnification obligation owing from debtor to threatened third party, or debtor's inevitable, burdensome involvement in ancillary litigation).

informing the bankruptcy court of National Union's claims. Moreover, National Union contests Delta's conduct *after* the final judgment was entered in state court, because Delta effectively settled its obligations with the debtors out of court and without notice to National Union. Potential liability deriving from such post-judgment conduct is not "double jeopardy" in any sense.

In sum, Delta would extend the ambit of § 105 well beyond its bankruptcy-related purposes, and its petition to this Court should thus be denied.

(iv) The bankruptcy court lacked authority to issue the disputed injunction pursuant to 28 U.S.C. § 2283.

Delta also wrongly argues that the bankruptcy court had authority to issue the disputed injunction pursuant to 28 U.S.C. § 2283. The Anti-Injunction Act, 28 U.S.C. § 2283 bars the type of injunction granted by the bankruptcy court in the instant case, unless it falls within one of three limited exceptions:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment. 28 U.S.C. § 2283.

Delta's arguments fall within the third exception, the "relitigation exception." The Fifth Circuit has explained the scope of this exception:

> The relitigation exception was "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*,

> 486 U.S. 140, 147, 108 S.Ct. 1684, 1689-90, 100 L.Ed.2d 127 (1988). The exception applies, however, only if the parties to the original action actually disputed the issue and the trier of fact actually resolved it. *See James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 459-60 (5th Cir.), *cert. denied*, 404 U.S. 940, 92 S.Ct. 280, 30 L.Ed.2d 253 (1971).

Santopadre v. Pelican Homestead & Savings Association, 937 F.2d 268, 273 (5th Cir. 1991). In *Santopadre*, the builders who litigated the specific issue of their alleged 12.5% interest in a property were barred from bringing a new action in Louisiana state court reurging the same claim, because they had raised that claim and it had been decided in the prior federal litigation. *Id.* at 273-274.

In the instant case, Delta asserts the "relitigation" exception with respect to the issue of the forum in which Delta was obligated to satisfy the judgment that it owed the debtors, an issue that existed solely between Delta and the debtors and was litigated solely between Delta and the debtors. Neither Delta nor the debtors gave the bankruptcy court notice of National Union's related claim for reimbursement of workers' compensation benefits, and neither Delta nor the Schwambs gave National Union notice of the bankruptcy proceedings. The situation is thus entirely different from the "relitigation" situation at issue in *Santopadre* and other cases where a party to prior litigation tries to reurge an issue or claim that has already been fully adjudicated.

Delta nonetheless seeks to rely upon the bankruptcy court's April 5, 1988 order, which at most adjudicated the proper forum in which Delta was obligated to satisfy the judgment it owed the debtors. The relitigation exception,

founded in principles of *res judicata* and collateral estoppel, cannot bind National Union, a non-party to that decision, on a different claim and different issues. At most, the relitigation exception can be invoked to expand the scope of a valid injunction to "include those in privity with parties to the federal court action,"[20] or to embrace a non-party whose interest is so closely aligned with an actual party's interests that the party functions as the non-party's "virtual representative."[21] Neither situation exists in the instant case, in which Delta and the debtors effected the equivalent of an illicit, out-of-court settlement without notice to National Union, the payor of workers' compensation benefits.[22]

Both Delta and the debtors left National Union and the bankruptcy court to wander in such a vacuum that the bankruptcy court itself was led to complain that "[t]he Court feels that an injustice has been done and that if notice had been sent to all interested parties, we would not be here today." (App. 20.) Delta offers no cognizable argument to justify its role in creating such a situation, nor any argument to justify the bankruptcy court's injunction as protecting or effectuating its orders and

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[20] *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990), *cert. denied*, 499 U.S. 925, 111 S.Ct. 1322, 113 L.Ed.2d 255 (1991).

[21] *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-1175 (5th Cir. 1987).

[22] *St. Paul Fire & Marine Ins. Co. v. Whitmire*, 578 So.2d 1180, 1183 (La.App.5th Cir. 1991), *writ denied*, 581 So.2d 707 (La. 1991); *Aetna Casualty & Surety Co. v. Hanover Ins. Co.*, 569 So.2d 1078, 1081 (La.App.3d Cir. 1990), *aff'd*, 574 So.2d 363 (La. 1991); *Shiver v. Wilson's Department Store*, 559 So.2d 864 (La.App.4th Cir. 1990).

decrees. Instead, the decisions cited by Delta undermine Delta's contentions.

For example, in *Kokkonen v. Guardian Life Ins. Co. of America*, 62 U.S. 4313, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), this Court refused to allow an exercise of ancillary jurisdiction to enforce a settlement agreement when the dismissal order entered by the court neither obligated the parties to perform the agreement nor provided for the court to retain jurisdiction to enforce the agreement. *Kokkonen*, ___ U.S. at ___, 114 S.Ct. at 1677 (1994). In the instant case, the order relied upon by Delta likewise did not even purport to touch upon National Union's claim to the money deposited by Delta into the registry of the bankruptcy court, because Delta failed to inform either the bankruptcy court or National Union of the full scope of proceedings at the time.

In another decision, the federal court enjoined the New York County Public Administrator from restraining a decedent's family members from qualifying as personal representatives in a method already prescribed by the federal court for the purpose of pursuing claims in federal court on behalf of the decedent. *Complaint of Cosmopolitan Shipping Co., S.A.*, 453 F.Supp. 268 (S.D.N.Y. 1978). Delta was not the victim but the perpetrator of efforts to undermine preexisting litigation, with its failure to advise either National Union or the bankruptcy court of the full scope of proceedings in 1988.

In still another decision, the court enjoined the plaintiff in a federal trade secrets case from using material obtained through discovery in that case to pursue a suit that the same plaintiff later filed in state court. *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245 (2d Cir. 1961). Unlike in *Rothlein*, National Union intervened in state court in

1985, and amended its claims to include Delta in 1989 (App. 5-6). Delta first unsuccessfully sought summary judgment against National Union in Louisiana state court, and only later began its lengthy efforts to block National Union in bankruptcy court (App. 25).

The same distinction applies to the decision in *Olin Corp. v. Insurance Co. of North America*, 807 F.Supp. 1143 (S.D.N.Y. 1992), in which the court granted an injunction pursuant to 22 U.S.C. § 2283 to bar Olin from relitigating issues already decided by the federal district court. The court in *Olin* noted this Court's holding that "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Olin*, 807 F.Supp. at 1153, quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148, 108 S.Ct. 1684, 1690, 100 L.Ed.2d 127 (1988).[23]

In *Olin*, unlike the instant case, the federal court had decided a choice of law issue prior to Olin's effort to obtain a different ruling in state court, and the federal court thus enjoined relitigation of the issue pursuant to 28 U.S.C. §§ 1651 and 2283.[24] In this case, Delta seeks to bar

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[23] *See also Baker v. Gotz*, 415 F.Supp. 1243 (D.Del. 1976). In that case, a federal court invalidated a sequestration of funds and ordered return of those funds. In a subsequent state court action, plaintiffs obtained another sequestration order and continued to sequester the funds. The federal court ordered return of all funds and enjoined any further sequestration pursuant to state or federal court orders.

[24] Delta cites the All Writs Act, 28 U.S.C. § 1651, only once, and then without any explanation, in its petition to this Court. (Petition at p. 24.) National Union can only infer that Delta refers to the All Writs Act as the jurisdictional basis for the

"relitigation" of an issue never joined, Delta's liability to National Union, against National Union a party left out of the bankruptcy proceedings until the debtors had paid all of their other creditors and departed with the remaining funds.

In sum, Delta seeks to bar "relitigation" of National Union's claim against Delta, an issue never joined against a party never joined in bankruptcy court. Delta seeks such relief despite the fact that Delta knew of National Union's claim when Delta deposited over $1 million in the registry of the bankruptcy court, without informing either the bankruptcy court or National Union of the full scope of proceedings involving Delta and the debtors. The Anti-Injunction Act bars Delta from seeking such inappropriate relief, and Delta's petition to this Court should therefore be denied.

(v) Delta suffered no violation of due process.

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War

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requested injunction, as in *Olin, supra*. Because an injunction is barred by the Anti-Injunction Act, National Union does not fully brief whether a bankruptcy court could issue an injunction pursuant to the All Writs Act. However, 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the U.S. District Court for the Eastern District of Louisiana (discussed above) do not appear to have referred any authority to the bankruptcy court under the All Writs Act. *See In re Fisher*, 151 B.R. 895, 899 (Bankr. N.D.Ill. 1993) (similar analysis of 28 U.S.C. § 1367).

> or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Delta wrongly claims that it will be deprived of property without due process of law unless this Court restores the permanent injunction granted by the bankruptcy court and overturned by the district court and the Fifth Circuit. In making such a claim, Delta first ignores the fact that it had its day in court and lost in the district court and the U.S. Fifth Circuit Court of Appeals. Second, Delta ignores the fact that it is only trying to enjoin a trial in state court in which due process will presumably be accorded to Delta.

Third, Delta ignores the due process considerations in the only case it cites in support of a specific argument. Delta makes the following query in its Petition to this Court:

> If "Fifth Amendment due process considerations take precedence over the discharge provisions of the Bankruptcy Code" where lack of notice is involved, *In re Eliscu*, 85 B.R. 480, 482 (Bankr. N.D.Ill. 1988), citing *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1949) [*sic*], should not the same considerations be paramount when a party is threatened in state court with deprivation of property as a direct consequence of its compliance with a federal court order?

Petition at p. 16. In *In re Eliscu*, the court noted that due process trumps the discharge provisions of the Bankruptcy Code "where the debtor has knowledge of claims

and fails to inform claimants of the pendency of the proceedings." *In re Eliscu*, 85 B.R. 480, 482 (Bankr. N.D.Ill. 1988). The court went on to quote this Court's statement in *Mullane* that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id., quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Delta had full notice of the 1988 adversary proceeding. It was National Union who was deprived of notice and due process in the bankruptcy court. The debtors filed a motion to compel deposit of funds on April 4, 1988 (App. 24) and the bankruptcy court granted it the next day (*id.*). Delta then paid over one million dollars into the registry of the bankruptcy court without telling the bankruptcy court about National Union's claim, and now complains noisily about "civil double jeopardy" and purported violations of due process. It was Delta who created that situation when it did not say a word to the bankruptcy court nor to National Union. Delta could have avoided all of its purported problems, and the situation later described by the bankruptcy court as "an injustice" (App. 20).

Delta should have avoided the whole situation, because Delta had an obligation to the court to inform the court about National Union's claim. Local Rule 1.05 of the United States District Court for the Eastern District of Louisiana provides as follows:

> Whenever a civil matter, commenced in or removed to the court, involves subject matter that either comprises all or a material part of the subject matter or operative facts of another action, whether civil or criminal, then pending before this or another court or an administrative agency, or previously dismissed or decided by this court, counsel shall append on a separate sheet of paper, to the front of the complaint, a list and description of all such actions then known to counsel and a brief summary of the relationship. If information concerning any such action or proceeding is obtained subsequent to the filing of the original pleading in the latter case, *it shall be the duty of counsel obtaining such information to notify the court* and opposing counsel in writing of the information so received in the same manner.

(Emphasis added.)

The bankruptcy court found that Delta did not violate Rule 1.05 because it was not Delta who commenced the 1988 adversary proceeding (App. 15). However, the emphasized portion of Rule 1.05 applies by its terms to counsel for parties other than a plaintiff, and creates a continuing duty. Rule 1.05 is simply a procedural vehicle to implement the widely recognized duty of candor to the tribunal. Rule 3.3 of the American Bar Association's Model Rules of Professional Conduct provides, in pertinent part, that "[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; [or] (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. . . . " Comment [2] to that

Rule explains that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

As explained by Delta in its Petition, National Union was entitled to reimbursement for workers' compensation payments "off the top" of the amount that Delta was obligated to pay to the debtors. (Petition at pp. 5-6 n.4.) Delta therefore stood to lose absolutely nothing by informing the bankruptcy court of National Union's claim, and Delta's counsel had no reason to avoid such disclosure as it would not interfere with counsel's zealous representation of his client.

In this context, it is implausible for Delta to claim a violation of due process. First, National Union, not Delta, was deprived of notice. Second, any injury suffered by Delta could have been avoided by Delta informing the bankruptcy court or National Union of the full scope of proceedings involving the debtors' claim to the funds deposited by Delta. Third, Delta seeks to perpetuate an injustice to National Union which was, at least in part, caused by Delta's own failure to disclose National Union's claim to the bankruptcy court seven years ago. For these reasons, Delta's petition should be denied.

CONCLUSION

For the reasons stated above, petitioner, Delta Airlines, Inc. has not shown any error in the decisions of the U.S. Fifth Circuit Court of Appeals and the United States District Court for the Eastern District of Louisiana, which properly reversed a decision of the United States Bankruptcy Court for the Eastern District of Louisiana. Neither has Delta shown any other basis for this Court to grant Delta's petition for writ of certiorari.

Respondent, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, therefore requests that this Court deny Delta's petition for writ of certiorari.

Respectfully submitted,

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